Supreme Court, U.S.
FILED
MAY 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

In the Matter of ROBINTECH, INC., *Debtor*

BOB BULLOCK, Comptroller of Public Accounts of the State of Texas,
Petitioner

vs.

OPPENHEIM, APPEL, DIXON & CO., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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May 16, 1989

QUESTION PRESENTED

Subject to certain irrelevant exceptions, Bankruptcy Rule 2002(a)(8) requires that all creditors in a Chapter 11 proceeding be given not less than 20 days notice by mail of the time fixed for filing proofs of claims ("bar date") pursuant to Rule 3003(c). Rule 9006(f) provides that when there is a right or requirement to do some act within a prescribed period after service of a notice and the notice is served by mail, three days shall be added to the prescribed period.

The question presented is: If notice of a "bar date" is mailed to a creditor in a Chapter 11 bankruptcy proceeding exactly 20 days before the bar date, does Bankruptcy Rule 9006(f) serve to extend the time by three days in which the creditor may file a proof of claim.

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In The Matter Of ROBINTECH, INC., *Debtor*

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Bob Bullock, Comptroller of Public Accounts of the State of Texas, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on January 20, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 863 F.2d 393, and is reprinted, along with the Court's judgment and the Order denying the Petition for Rehearing, as Appendix "A".

The memorandum Opinion and Order of the United States District Court for the Northern District of Texas, Fort Worth Division (Belew, David 0. Jr.) has

not been reported to this writer's knowledge. It is reprinted as Appendix "B".

The Findings of Fact and Conclusions of Law of the Bankruptcy Court are reported at 69 B.R. 663, and are reprinted along with the Order Allowing Claim of Comptroller of Public Accounts as APPENDIX "C".

JURISDICTION

The Court of Appeals for the Fifth Circuit rendered its decision in this case on January 20, 1989. A timely Petition for Rehearing was denied on February 15, 1989, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

RULES OF BANKRUPTCY PROCEDURE INVOLVED

The Bankruptcy Rules involved are Rule 2002(a), Rule 3003, and Rule 9006. Since the provisions of these rules are lengthy, their pertinent texts are set forth in Appendix "D".

STATEMENT OF THE CASE

On July 7, 1983, an involuntary Chapter 11 Petition was filed in the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division, against Robintech, Inc. ("Debtor"). On January 25, 1984, the Bankruptcy Court signed an Order which set February 14, 1984 as the date by which proofs of claims were to be filed. A copy of the Order was mailed to Petitioner Bob Bullock, Comptroller of Public Accounts of the State of Texas on January 25, 1984, and it was received by Petitioner on January 31, 1984. Petitioner filed a proof of claim for $92,742.90 in delinquent sales and use taxes on

February 16, 1984, two days past the deadline date for filing claims, which is ordinarily called the bar date. Petitioner is the state official in Texas who is responsible for the administration and collection of the Texas sales and use tax.

Respondent, Oppenheim, Appel, Dixon & Co., Bankruptcy Trustee, filed an Objection to Petitioner's Claim and Motion for Summary Judgment on Objection to the Claim on the ground that the claim was filed after the bar date. Petitioner responded that Bankruptcy Rule 9006(f) extended the deadline for filing claims by three days as a result of the mailing of the notice of bar date.

The jurisdiction of the Bankruptcy Court was invoked under 28 U.S.C. §157(b) and after a hearing on the Motion for Summary Judgment, the Bankruptcy Court entered its Findings of Fact and Conclusions of Law on February 3, 1987. The Bankruptcy Court concluded that Bankruptcy Rule 9006(f) applied to the notice of bar date at issue. Therefore, the Petitioner's proof of claim was deemed timely filed. (APPENDIX C, p. App. 23) On February 12, 1987, the Bankruptcy Court denied the Respondent's Motion for Summary Judgment and allowed Petitioner's proof of claim. (APPENDIX C, p. App. 26)

Respondent appealed the Bankruptcy Court's Order allowing the Petitioner's claim to the United States District Court for the Northern District of Texas, Fort Worth Division, and the District Court took jurisdiction under 28 U.S.C. §158.

There were three issues presented by Respondent on appeal to the District Court, but the issue the District Court found dispositive of the appeal was whether the Bankruptcy Court erred in concluding that Bankruptcy Rule 9006(f) extends the time in

which a claimant may file a proof of claim by three days beyond the bar date when the notice of the order establishing the bar date is served by mail. The District Court held since in Chapter 11 bankruptcy cases it is the mailing of the notice of bar date that triggers calculation of the 20 day notice requirement contemplated by Bankruptcy Rule 2002(a)(8), that Rule 9006(f) did apply to the mailing of Petitioner's notice pursuant to Bankruptcy Rule 2002(a)(8) and that Petitioner's proof of claim was deemed to be timely filed. (APPENDIX B, p. App. 18) The District Court then affirmed the Bankruptcy Court's ruling allowing Petitioner's proof of claim for $92,742.90 in sales and use taxes.

Invoking federal jurisdiction under 28 U.S.C. §1291, Respondent appealed the District Court's order of March 23, 1988 which affirmed the Bankruptcy Court's ruling, to the Fifth Circuit. The Court of Appeals reversed, holding that Bankruptcy Rule 9006(f) did not apply to the mailing of Petitioner's notice of bar date. (APPENDIX A, p. App. 5) In determining whether to apply Rule 9006(f), the Fifth Circuit noted that Rule 9006(f) is worded very similarly to Fed. R. Civ. P. 6(e) and concluded that Rule 9006(f) could be construed by reference to precedents interpreting Rule 6(e) and relied upon *Carr v. Veterans Administration*, 522 F.2d 1355, 1357 (5th Cir. 1975). In *Carr*, the Court held that Rule 6(e) applies only when the "prescribed period" is fixed by the date on which notice is served, and it did not apply to modify the six month period for bringing action against the United States pursuant to 28 U.S.C. §2401(b) because the prescribed period of limitations commenced with the "date of mailing" and not with the "service of a notice or other paper".

REASON FOR GRANTING THE WRIT

The decision below that Bankruptcy Rule 9006(f) does not apply to the mailing of a notice of bar date pursuant to Bankruptcy Rule 2002(a)(8) raises an important and unresolved problem regarding the construction of a federal rule of bankruptcy procedure.

In arriving at its decision in this case, the Fifth Circuit not only disregarded long-standing rules of construction, but it also relied upon the Fifth Circuit decision of *Carr v. Veterans Administration*. This case is not on point with the facts of the instant case and it is construing Fed. R. Civ. P. 6(e) instead of Bankruptcy Rule 9006(f).

The Federal Rules of Civil Procedure have the force and effect of statutes. *American Federation of Musicians v. Stein*, 213 F.2d 679 (6th Cir. 1954), *cert. denied*, 348 U.S. 873, 75 S.Ct. 108 (1954). By analogy, the Federal Rules of Bankruptcy Procedure should be construed similarly to statutes.

Under long-standing rules of statutory construction, the plain language of a statute (or in this case, rule) controls when sufficiently clear in its context. See *Ernst & Ernst v. Hockfelder*, 425 U.S. 185, 201, 96 S.Ct. 1375, 1385 (1976). As to a Federal Rule of Criminal Procedure, see *Bowman Dairy Co. v. U.S.*, 341 U.S. 214, 220, 71 S.Ct. 675, 679 (1951). "When the terms of a statute are unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances." *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701 (1981).

Bankruptcy Rule 2002(a)(8) requires the court clerk to give a creditor "not less that 20 days notice by mail" of the time fixed for filing proofs of claims pursuant to Rule 3003(c), which is the rule governing the filing of a proof of claim in a Chapter 11 proceeding. The language of Bankruptcy Rule 9006(f) is clear and unambiguous and reads as follows:

> (f) Additional time after service by mail. *When there is a right* or requirement *to do some act* or undertake some proceedings *within a prescribed period after service of a notice* or other paper *and the notice* or paper other than process *is served by mail, three days shall be added to the prescribed period.* (Emphasis added)

Under these rules, the Petitioner had the *right to file a proof of claim within not less than 20 days after service by mail of the notice* of bar date, therefore three days should be added to the 20 days giving the Petitioner 23 days notice by mail of the bar date. Since Petitioner's notice of bar date was mailed exactly 20 days before the bar date, Bankruptcy Rule 9006(f) should apply to afford Petitioner an additional three days beyond the established bar date to file his proof of claim.

Reading Rule 9006(f) in conjunction with Rule 2002(a)(8) does not afford every creditor in a Chapter 11 proceeding an extra three days beyond the bar date to file a proof of claim. For example, if the notice of bar date had been mailed to Petitioner 23 days or more before the bar date, Petitioner would have had to file his proof of claim on or before the bar date to be considered timely filed. Since notice by mail of the bar date is complete on mailing pursuant to Rule 9006(e), Rule 9006(f) attempts to alleviate this circumstance by offsetting the delay caused by mailing of notice with a

three-day grace period added to the bar date. Rule 9006(f) should be construed that creditors have at least twenty-three days from the date of the mailing of the notice of the bar date to file their claims, thereby allowing them at least 20 days from the date of actual notice of the bar date to file their claims.

Even though Petitioner had knowledge of the bankruptcy reorganization, he and other similar creditors, who must file large numbers of bankruptcy claims in many different proceedings with differing bar dates, should have a right that the proper, adequate and constitutional notice will be given them before their claims are forever barred. *City of New York v. New York*, N.H. & H.R. Co., 344 U.S. 293, 297, 73 S.Ct. 299, 301 (1953).

CONCLUSION

The issues of the construction of Bankruptcy Rule 9006(f) and whether Rule 9006(f) applies to Bankruptcy Rule 2002(a)(8) affects every creditor who files a proof of claim in a Chapter 11 bankruptcy proceeding. Review of the opinion below is necessary to end the confusion as to the interpretation of these rules. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

In the Matter of ROBINTECH, INC., *Debtor*

OPPENHEIM, APPEL, DIXON & CO., *Appellant*

v.

Bob BULLOCK, Comptroller of Public Accounts of the State of Texas, *Appellee.*

No. 88-1269

United States Court of Appeals, Fifth Circuit

Jan. 20, 1989.

Appeal from the United States District Court for the Northern District of Texas

Before REAVLEY, HIGGINBOTHAM, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

We are called upon today to determine whether the district court properly upheld a bankruptcy court ruling permitting a creditor to file his claim after the bar date in a Chapter 11 proceeding. Concluding that the district court's decision was based upon clearly erroneous findings of fact and misapplications of law, we reverse and hold that the creditor's claim is barred.

I. *Factual and Procedural Background.*

On July 7, 1983, an involuntary petition was filed against Robintech, Inc. (the "debtor"). The order for relief was entered on July 20, 1983. The notice of the first meeting of creditors was mailed on September

23, 1983, and the first creditors' meeting was held on October 25, 1983.

The bankruptcy court signed the Order Setting Bar Date Within Which Proofs of Claim Must Be Filed ("Bar Date Order") on January 25, 1984. The Bar Date Order provided that creditors must file proofs of claim with the Clerk of the Bankruptcy Court on or before February 4, 1984, at 4:30 p.m. A copy of the Bar Date Order was sent by the debtor to each of its creditors whose name and address was set forth in the exhibit that was attached to the certificate of mailing that was filed of record on January 23, 1984. Bob Bullock, Comptroller of Public Accounts of the state of Texas ("Comptroller"), was included in that list of creditors. The notice to the Comptroller was sent by the debtor to the following address, which was listed on the exhibit to the certificate of mailing:

State Treasurer - Bob Bullock
Comptroller of Public Accounts
Capitol Station
Austin, Texas 78774

The Comptroller received the notice of the bar date on January 31, 1984, and filed his priority proof of claim in the amount of $92,742.90 on February 16, 1984, two days after the deadline established in the Bar Date Order. The bankruptcy trustee, appellant Oppenheim, Appel, Dixon, & Co. (the "trustee"), filed its objection to the Comptroller's claim on November 28, 1984, on several grounds, including that the claim was filed after the bar date. The Comptroller's answer stated that his failure to file a claim by February 14, 1984, was the result of excusable neglect and that Bankruptcy Rule 9006(f) extended the deadline for filing claims by three days as a result of the mailing of the notice of the bar date.

The trustee filed a motion for summary judgment on October 28, 1986. At the hearing of this motion, the Comptroller argued that rule 9006(f) served to extend the bar date by three days because the notice of a bar date was served by mail and that his claim should have been deemed, therefore, to have been timely filed. The Comptroller made no argument that his failure to file his claim before the bar date was the result of excusable neglect.

During that hearing, the Comptroller also asserted for the first time that there were inaccuracies in the address on the notice of the bar date that allegedly caused a delay in receipt, thereby depriving him of adequate notice of the bar date. The Comptroller alleged that the notice, as addressed, was initially received by the State Attorney General's Office, another state agency that uses the same post office address.

At the close of the hearing, the bankruptcy court requested additional evidence concerning the address used by the debtor to transmit the notice to the Comptroller. The Comptroller filed a letter memorandum on December 8, 1986, wherein his correct mailing address was alleged to be P.O. Box 13528, Capitol Station, Austin, Texas 78711. He also noted in this letter memorandum that the zip code used on the certificate of mailing is the correct one for his street address but not his post office box. Finally, the Comptroller asserted that he received the notice of bar date on January 31, 1984.

On February 3, 1987, the bankruptcy court entered its findings of fact and conclusions of law, which stated (1) that the notice of bar date had been addressed to "State Treasurer - Bob Bullock, Comptroller of Public Accounts, Capitol Station, Austin, TX 78774; (2) that the correct address was

"State Comptroller, P.O. Box 13528, Capitol Station, Austin, TX 78711"; (3) that rule 9006(f) applies in the instant case to afford the Comptroller an additional three days beyond the established bar date to file his proof of claim, since notice of the bar date was given by mail; and (4) that the Comptroller filed his claim on February 16, within the extended three-day period allegedly authorized by rule 9006(f).

Consequently, the court concluded that the Comptroller's claim was deemed to be timely filed. On February 17, 1987, the bankruptcy court denied the trustee's motion for summary judgment and allowed the claim.

On appeal to the district court, the trustee argued that rule 9006(f) does not extend the bar date by three days just because the notice of the bar date is served by mail but that the rule instead applies only in situations where personal service is the primary method of service. The trustee also contended that minor inaccuracies in the Comptroller's address did not vitiate the effect of the timely mailing of the notice thereto. The Comptroller responded, expectedly, that rule 9006(f) applies in this case to afford him an additional three days beyond the established bar date to file his proof of claim and that the notice was misaddressed, delaying receipt and impairing the Comptroller's ability to file his claim before the bar date. The district court affirmed; we now reverse.

II. *Bankruptcy Rule 9006(f)*

[1] Subject to certain irrelevant exceptions, Bankruptcy Rule 2002(a)(8) requires that "all creditors ... [be given] not less than 20 days notice by mail of ... the time fixed for filing proofs of claims pursuant to Rule 3003(c)." The advisory committee note indicates that notice by mail is effective upon mailing. Rule

3003(c)(3) provides that courts in Chapter 11 cases "for cause shown may extend the time within which proofs of claim or interest may be filed." Rule 9006(f) provides that [w]hen there is a right or requirement to do some act ... within a prescribed period after service of a notice ... and the notice ... is served by mail, three days shall be added to the prescribed period."

In determining whether to apply rule 9006(f) in this case, we note that it is worded very similarly to Fed.R.Civ.P. 6(e). In fact, the advisory committee note indicates that Rule 9006(f) "is new and is the same as Rule 6(e)F.R.Civ.P." Hence, we may construe the former rule by reference to precedents interpreting the latter.

Our own rule 6(e) precedent weighs heavily against applying rule 9006(f) to the instant case. In *Carr v. Veterans Admin.*, 522 F.2d 1355, 1357-58 (5th Cir.1975), we held that the purpose of rule 6(e) is only to guarantee that parties served personally have no advantage over those served by mail. The rule accordingly applies only when the "prescribed period" is fixed by the date on which notice is served.[1] Where, as here, all notices must be by mail, there is no need for such compensation, as all parties are theoretically subject to the same delays. Thus, *Carr* instructs that rule 9006(f) does not apply to the instant facts.

Our reliance here upon *Carr* underscores the fact that Federal Rules of Civil Procedure precedent can be helpful, in appropriate instances, in construing the new Bankruptcy Rules. This is true at least where,

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[1] For example, if some act must be done within ten days of notice and one party is served personally and another by mail under a "mail box rule," the first party would have the unfair advantage of the time it takes the letter notice to reach the second. The three-day extension functions to compensate for this possible disparity.

as here, either the bankruptcy rule itself or the accompanying advisory committee note makes reference to an analogous or seminal civil rule. Our application of rule 6(e) precedent to rule 9006(f) in this case is similar to the approach we recently followed, for example, in *In re Seiscom Delta, Inc.*, 857 F.2d 279, 281 (5th Cir.1988)(employing Fed.R.Civ.P. 58 authority in interpreting Bankruptcy Rule 9021(a)) and *In re Aguilar*, 861 F.2d 873, 874-75 & n. 2 (5th Cir. 1988) (per curiam) (noting that Bankruptcy Rules 9023 and 9024 are equivalent to, respectively, Fed.R.Civ.P. 59 and 60, except as otherwise expressly provided).

III. *Improper Address*

The trustee's brief confuses the discussion of whether it was negligent in giving notice with the issue of the adequacy of the thirteen-days' notice received by the Comptroller. These are distinct questions. The latter really concerns whether, under these facts and circumstances, the creditor should be estopped from claiming that he was harmed by defective notice.

[2] Certain findings made by the district court appear to be clearly erroneous. There is no evidence supporting the finding that the delay in receipt of notice cased the late filing. The court relied exclusively upon *In re Am. Properties, Inc.*, 30 B.R. 239 (D.Kan. 1983), which held that fifteen days' notice was insufficient where the creditor never received the notice, never filed any claim, and had no prior knowledge of the bankruptcy. However, the court in that case made specific supported findings on each of these points. Patently, that decision does not impose a bright-line fifteen-day rule.

The proper resolution rather depends upon the facts and circumstances of each particular case. Thus, to the extent that the district and bankruptcy courts

applied the fifteen-day test as a matter of law, this represents an improper legal conclusion. To the extent that they found facts indicating that a facts-and-circumstances test was met, such findings were completely conclusory.

[3] At best, the record supports a finding that the notice may have been misaddressed and that this may have caused a two-day delay in receipt. But there is no indication that any such delay in receipt caused the delay in filing. The Comptroller's brief bemoans the huge case load which he handles and the complications in preparing a claim, but most of this amounts to summary assertion. The record contains no specific evidence of causation that could support such a finding. This, even if the address were improper, this does not excuse the late filing, and we may reverse without remanding to determine whether the address was actually incorrect.

IV. *Receipt of Notice and Vitiating Effect.*

[4] A creditor's claim can be barred for untimeliness only upon a showing that it received reasonable notice. *New York v. New York, New Haven & Hartford R.R.*, 344 U.S. 293, 297, 73 S.Ct. 299, 301, 97 L.Ed.2d 333 (1953); *Am. Properties*, 30 B.R. at 245; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 318, 70 S.Ct. 652, 657, 659, 94 L.Ed. 865 (1950). Hence, whether notice to a creditor is adequate depends upon the facts and circumstances of a given case. In general, due process requires that reasonable notice is that which is reasonably calculated to reach all interested parties, reasonably conveys all of the required information, and permits a reasonable amount of time for response. *Mullane*, 339 U.S. at 314, 318, 70 S.Ct. at 657, 659. In the instant case, evaluation of notice encompasses two distinct questions: first, whether the circumstances indicate that the creditor

actually had or should be charged with notice before receipt of the trustee's letter; and second, whether, assuming that the creditor had no adequate prior notice, the thirteen days it had, in comparison to the possible twenty, were sufficient to pass muster.

[5] The trustee's claims that the creditor had or should be charged with prior notice boil down to the assertion that a general awareness of the pending bankruptcy for several months bars any complaints as to minor failures in specific notice. Because the Comptroller should have been aware of the declaration of bankruptcy in July and the creditor's meeting in October, he had plenty of time to prepare his claim and should not now be heard to argue that he had inadequate notice.

[6] Having determined that the Comptroller at least should have been generally aware of the bankruptcy and the possibility of having to prepare a claim, we now address the efficacy of the notice actually received. The Comptroller at most lost two days in preparing his claim as a result of the possibly incorrect address. In any event, he had thirteen days out of a possible twenty. Certainly, if he had the full twenty days, he could have no complaints as to defective notice. As we have stated, there is no evidence that the two-day delay caused the late filing. If the Comptroller is to prevail on this claim, he must therefore explain, without relying upon the delay, why the full period was inadequate.

When the notice was received, the Comptroller knew that he had only thirteen days to file. An experienced creditor must be aware of the significance of bar dates. The Comptroller never asked for an extension or provided any excuse for his untimeliness

until the trustee moved for dismissal of its claim.[2] There is no evidence to support a finding that thirteen days was inadequate or unreasonable notice. The vague assertions regarding multiple cases and the difficulty of preparing a claim are no more adequate in this context than they were in proving that a possible two-day delay in receipt caused the late filing.

Moreover, the fact that the Comptroller handles a myriad of claims such as this, on behalf of the State of Texas, and that such is indeed one of the most important functions of his office, suggests that his staff should be especially proficient in filing claims to protect the public purse. Thus, inability to file claims on time, while perhaps understandable on the part of an inexperienced creditor, is hardly an excuse for this creditor.

[7] Finally, in its discussion of notice defects the bankruptcy court included allusions to general constitutional deficiencies. To the extent that these considerations affected the outcome, they were wrong as a matter of law and do not warrant substantial discussion. The cases referred to[3] consider the

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[2] The requirement for getting an extension before the bar date is strict: "In most cases, if the creditor has enough notice to seek an extension of the time for filing, enough time will exist actually to prepare and file a proof of claim. However, where time is required to liquidate the claim or where substantial investigation is required, an extension of time is appropriate." 8 *Collier on Bankruptcy* ¶ 3003.05(4) at 3003-11 (15th ed. 1988). The Comptroller also could have, but failed to, ask for an extension after the bar date passed, basen upon excusable neglect. 9 *Collier on Bankruptcy* ¶ 9006.06 at 9006-15 through 9006-18 (15th ed. 1988). As revealed in the discussion above and below, there is no indication that the Comptroller could have satisfied either of these standards if he had sought an extension.

[3] I.e. *New York v. New York, New Haven & Hartford R.R.; In re Intaco Puerto Rico, Inc.*, 494 F.2d 94, 99 (1st Cir.1974) (relying upon significance of failure to mail notices to any creditors).

adequacy of various forms of notice by publication and whether the receiving party should be charged with the awareness of such notice. Where the party actually receives a notice with only a minor delay, there can be no due process problem without a showing of harm. To say that any defect in notice here, either because of the two-day delay or the general inadequacy of the thirteen-day period where twenty days is the effective maximum, rises to constitutional dimensions presumably would call into question many existing notice systems.

The purpose of the bankruptcy laws is quickly and effectively to settle bankrupt estates. *Katchen v. Landy*, 382 U.S. 323, 328, 86 S.Ct. 467, 471-72, 15 L.Ed.2d 391 (1966). Under the Bankruptcy Code and rules, creditors play a zero-sum game in which failure to navigate effectively through various intricate procedures can mean total defeat. Moreover, because such procedures are thought to be necessary to protect the bankrupt and the creditors, exceptions cannot be made every time a creditor claims a hardship. *See In re Cleary*, 18 B.R. 114, 115 (Bankr.W.D.Pa. 1982). Frequent players in the bankruptcy arena, such as the Comptroller, know this and are aware that deadlines are important and should not be heard to complain of the unfairness except under the most egregious circumstances. To allow the late-filed claims of creditors such as the Comptroller, under the circumstances of this case, would be unfair to all of the creditors who filed on time, despite possible hardships, and whose slice of the bankruptcy pie would be smaller as a result. *See In Re Clear Fork Energy Resources, Inc.*, 44 B.R. 110, 113 (Bankr.N.D.Tex.1984). In general, it is the other diligent creditors who will be harmed by permitting late claims, not the trustee whose actions may have been a factor in the late filing.

For the aforementioned reasons, we REVERSE the district court and render judgment that the Comptroller's claim is barred.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-1269

D.C. Docket No. CA-4-87-275-K

IN THE MATTER OF: ROBINTECH, INC., *Debtor*

OPPENHEIM, APPEL, DIXON & CO.
Appellant,

versus

BOB BULLOCK, Comptroller
of Public Accounts of the
State of Texas
Appellee.

Appeal from the United States District Court
for the Northern District of Texas

Before REAVLEY, HIGGINBOTHAM, and SMITH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED, that appellee pay to appellant the costs on appeal, to be taxed by the Clerk of this Court.

January 20, 1989

ISSUE AS MANDATE: February 27, 1989

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 88-1269

IN THE MATTER OF ROBINTECH, INC.,
Debtor.

OPPENHEIM, APPEL, DIXON & CO.,
Appellant,

versus

BOB BULLOCK, Comptroller of Public Accounts of the State of Texas
Appellee

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING
(February 15, 1989)

Before REAVELY, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/

United States Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

**OPPENHEIM, APPEL,
DIXON & CO.
IN RE: ROBINTECH, INC.**

VS.

CA4-87-275-K

**BOB BULLOCK, Comptroller of
Public Accounts of the State
of Texas**

ORDER

Pending before the Court is Appellant's Appeal from the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division. Bob Bullock, as Appellee, filed a response to which Appellant filed a reply. The Court, after reviewing the parties' arguments and the record, and analyzing the holding of the Bankruptcy Court, is of the opinion that the Bankruptcy Court's holding is well-taken and shall stand.

This Court has jurisdiction pursuant to 28 U.S.C., section 158. The instant appeal is from an Order denying the Motion for Summary Judgment on Objection to Claim 658 filed by Oppenheim, Appel, Dixon & Co., trustee of the Robintech creditors' trust ("trustee"), Appellant herein. Said motion was filed on the ground that the claim of the Comptroller of Public Accounts of the State of Texas ("comptroller") was filed after the bar date and therefore should be disallowed. The bar date at issue was established by the Bankruptcy Court by Order dated January 25, 1984

and said Order set February 14, 1984 as the bar date by which proofs of claim were to be filed in the underlying bankruptcy case. Notice of that Order was mailed to the comptroller, albeit at the wrong address, on January 25, 1984 and it is undisputed that the comptroller nonetheless received it on January 31, 1984. It is also undisputed that the comptroller filed its proof of claim on February 16, 1984.

Following a November 25, 1986 hearing on the summary judgment motion before the Honorable Harold C. Abramson, United States Bankruptcy Judge, Judge Abramson issued findings of fact and conclusions of law, the essence of which are as follows. First, Judge Abramson concluded that the debtor had been negligent in misaddressing the notice of bar date and that consequently, the comptroller had not been afforded his constitutional right to adequate notice. Secondly, Judge Abramson concluded that Bankruptcy Rule 9006(f)[1] applied to the notice at issue in this case and therefore the comptroller's proof of claim was timely in any event.

Appellant states the issues on appeal as follows: (1) Did the Bankruptcy Court err in concluding that Bankruptcy Rule 9006(f) extends the time in which a claimant may file a proof of claim by three days beyond the bar date when the notice of the Order establishing the bar date is served by mail?; (2) Did the Bankruptcy

---

[1]Said rule provides:

Additional Time After Service by Mail. When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail, three days shall be added to the prescribed period.

Bankruptcy Rule 9006(f).

Court err in concluding that the notice of the Order establishing February 14, 1984 as the bar date was insufficiently addressed to the comptroller?; and (3) Did the Bankruptcy Court err in concluding that the comptroller's actual receipt of the notice on January 31, 1984 did not vitiate the effect of any errors in the address on the notice? As will be seen *infra*, the Court's analysis of Appellant's first argument is dispositive of the instant appeal and thus the Court need not reach Appellant's remaining arguments. Of course, this Court is bound to accept the factual findings of the Bankruptcy Court unless such findings are "clearly erroneous." *See* Bankruptcy Rule 8013; Fed.R.Civ.P. 52(a); *In re: Braniff Airways, Inc.*, 783 F.2d 1283, 1287 (5th Cir. 1986); *In re: Missionary Baptist Foundation of America*, 712 F.2d 206, 209 (5th Cir. 1983). However, conclusions of law are "fully reviewable" by this Court. *Dallas/Fort Worth Regional Airport Board v. Braniff Airways, Inc.*, 26 Bankr. 628, 630 (N.D. Tex. 1982). But, as alluded to *supra*, the Court here need only review one conclusion of law, to-wit, that Bankruptcy Rule 9006(f) serves to extend the time in which a claimant may file a proof of claim when notice of the bar date was served by mail.

In support of its contention that Rule 9006(f) should not be so applied, Appellant cites *In re Whitten*, 49 Bankr. 220 (Bankr. N.D. Ala. 1985). *Whitten* was a Chapter 13 case wherein the Bankruptcy Court held that Rule 9006(f) did not apply to extend the time to file a proof of claim in a Chapter 13 case. 49 Bankr. at 222. In so holding, the Court noted that the "Bankruptcy Rules provide no other means than by mail for the clerk to give these notices, as provided for in parts (a) and (f) of Rule 2002." *Id.* However, the Court went on to note that the time for filing a proof of claim in a Chapter 13 case is controlled by Bankruptcy Rule 3002(c) which provides that the filing must be

done "within 90 days after the first date set for the meeting of creditors ...." *Id.* at 221 (citation omitted). By contrast, the time for filing a proof of claim in a Chapter 11 case is controlled by Bankruptcy Rule 3003 in conjunction with Bankruptcy Rule 2002(a) which provides that the clerk shall give the debtor, trustee and all creditors "not less than 20 days notice by mail of ... the time fixed for filing proofs of claim pursuant to Rule 3003(c)." Bankruptcy Rule 2002(a)(8). With this in mind, the *Whitten* Court concluded that a literal reading of Rule 9006(f) shows that it does not apply to proof of claim filings in a Chapter 13 case. The Court's dispositive analysis was as follows: "The rule [9006(f)] refers to the right to do an act 'within a prescribed period after service of a notice,' when the notice is served by mail. The filing of a proof of claim [in a Chapter 13 case] is not within a *prescribed period* "after service of a notice." The filing of a proof of claim [in a Chapter 13 case] is an act within a *prescribed period* of 90 days after the first date set for the meeting of the creditors.' [In a Chapter 13 case], [i]t is the date first set for the meeting of creditors which triggers the running of time for the filing of the proofs of claim--not the mailing of the notice by the clerk of the court.'" 49 Bankr. at 222 (emphasis original).

In the instant case, Judge Abramson read *Whitten* to make Rule 9006(f) applicable to the filings of proofs of claim in Chapter 11 cases. *See* Findings of Fact and Conclusions of Law at 5 n.l. This Court agrees. In this Court's opinion, in Chapter 11 cases, it is the mailing of the notice that triggers calculation of the 20 day notice requirement contemplated by Rule 2002(a). *See* Advisory Committee Note to Rule 2002 (notice by mail is complete upon mailing). That being the case, and their being no explicit or implied exceptions in the rules, the Court holds that Rule 9006(f) does indeed apply to the mailing of a notice

pursuant to Rule 2002(a)(8). The comptroller's proof of claim, therefore, was timely filed.

For the foregoing reasons, the Bankruptcy Court's February 3, 1987 ruling allowing the comptroller's Claim 658 should be and hereby is AFFIRMED.

IT IS SO ORDERED.

SIGNED this 23rd day of March, 1988.

/s/

DAVID 0. BELEW, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS FT. WORTH DIVISION

IN RE:
ROBINTECH. INC. **CASE NO. 483-00558-11**

D E B T 0 R

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 24, 1984, the United States Bankruptcy Court for the Northern District of Texas, Ft. Worth Division, entered an order establishing February 14, 1984 as the bar date in which proofs of claim must have been filed in this case. Notice of that order was sent to the Comptroller of Public Accounts of the State of Texas ("the Comptroller"), on January 25, 1984. The notice was addressed, however, to

State Treasurer - Bob Bullock
Comptroller of Public Accounts
Capitol Station
Austin, Texas 78774.

The correct address was

State Comptroller
P. 0. Box 13528
Capital Station
Austin, Texas 78711.

The Comptroller received the notice, via other state offices, on January 31, 1984. The Comptroller did not file its proof of claim until February 16, 1984, two days after the bar date. The Trustee filed its objection to the claim and a motion for summary judgment on the ground that the claim was filed after the bar date.

Bankruptcy Rule 9006(e) states that "[s]ervice of process and service of any paper other than process or of notice by mail is complete on mailing." Thus once an item is placed in the mail, notice is considered complete. When mail is properly addressed, stamped and deposited, there is a rebutable presumption that it was received by the party to whom it was sent. Proper mailing, however, must be proved before the presumption is activated. *In re American Properties*, Inc., 30 B.R. 239, 243-44 (Bankr. D. Kan. 1983). If the proper and correct address was not used, the presumption cannot be activated. *Id.* at 244. Standards of correctness vary with the nature of the entity, private or public, and a less definite and more general address may be sufficient for a well known public entity. *Id.* Where an address is only slightly incorrect, as it was held to be in the *American Properties* case, the presumption is weakened, but still raised. Denial of receipt does not, as a matter of law, rebut the presumption, but rather creates a question of fact. *Id.*

The question of improper mailing in the case at bar is mentioned by the court in order to exemplify the importance of a proper address used by a Debtor or Trustee, in order to safeguard the rights of parties receiving such notice; also the purpose of this discussion is to exemplify the importance of a party receiving the notice to seek an extension of time in order to preserve its rights.

In a Chapter 11 case, the court has the power to set the time for filing of proofs of claim. Bankruptcy

Rule 3003(c) (3). Under Rule 2002(a)(8), notice of a bar date may be given not less than twenty days prior to the time set.

In the instant case, the order setting bar date was signed and notice of bar date mailed on January 25, 1984, exactly twenty days before the bar date of February 14, 1984. In the normal course of mail, the Comptroller should have received notice by at least January 27 or 28, giving the Comptroller 17 or 18 days to respond. This time was shortened by the fact that claims are not considered filed until actually received by the clerk and filed. Thus, the Comptroller would had to have mailed it *before* the actual bar date in order to ensure receipt and filing by February 14, 1984. Again. the time to file was further shortened by the debtor's failure to correctly address the notice. Due to this error, the Comptroller did not receive the notice until January 31, 1984. All factors considered, if the Comptroller had been able to use Express Mail for overnight delivery on the 13th, the Comptroller had a maximum of thirteen to fourteen days to file its claim, without an extension or the application of Rule 9006(f), discussed *infra*.

In *In re American Properties*, 30 B.R. 239 (Bankr. D. Kan. 1983), similar facts occurred with similar consequences. *See also* related cases, *In re American Properties (Board of County Commissioners of Johnson County, Kansas v. Coleman American Properties, Inc.)*, 30 B.R. 235 (Bankr. D. Kan. 1983), and *Board of County Commissioners of Sedgwick County, Kansas v. Coleman American Properties*, 30 B.R. 247 (Bankr. D. Kan. 1983). The court in that case had ordered a bar date of September 9, 1980 on August 22, 1980, a time limit of eighteen days. The misaddressed notice was held to have reached the county tax creditor eventually, even though it denied receipt. However, the court held that fifteen days was

too short a time period for allowing claims to be filed, and thus the notice was constitutionally insufficient to forever bar the county's claim. *Id.* at 245.

In the instant case, due to the debtor's negligence in misaddressing the notice, the Comptroller had less than fourteen days in which to file its claim. A creditor has the right to assume that proper, adequate and constitutional notice will be provided before its claim is forever barred. *American Properties*, 30 B.R. at 245 citing *New York v. New York, N.H. & Hartford R.R.*, 344 U.S. 293, 297, 73 S. Ct. 299, 301, 97 L. Ed. 333 (1953); *In re Intaco Puerto Rico, Inc.*, 494 F. 2d 94, 99 (lst Cir. 1974). The Comptroller here was not afforded this protection.

Rule 9006(f) provides that if notice is sent by mail to do some act or undertake some proceedings within a prescribed period, then three days shall be added to the prescribed period to allow for mailing. The Trustee argues that the additional three days to allow for mailing granted by Bankruptcy Rule 9006(f) is inapplicable here because creditors were given a deadline on or before which they were to file claims rather than a requisite number of days within which to file a claim.[1] The court does not recognize this distinction, and holds that 9006(f) applies in the instant case to afford the Comptroller an additional three days beyond the bar date to file its proof of claim. Since the Comptroller filed its claim on February 16, within the three days added by 9006(f), its claim was timely filed and should be allowed.

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[1]The case of *In re Whitten*, 49 B.R. 220 (Bankr. N.D. Ala. 1985), cited by the Trustee in support of this proposition, is improper precedent for the Chapter 11 case at bar. Whitten is a Chapter 13 case and specifically makes applicable Rule 9006(f) to Chapter 9 and Chapter 11 cases.

The Trustee also argues that allowing a claim to be filed after the bar date would be inequitable and prejudicial to the debtor and other creditors who complied with and acted in reliance on the bar date, by dissipating the pool of funds available for distribution. The equities in this case are difficult to balance. On the one hand, the Debtor's negligent actions impaired the Comptroller's ability to file a timely claim. On the other hand, although the Comptroller had insufficient time to file its claim before the bar date, it also took no action to seek an extension of such time. Rule 3003(c)(3) allows the court to extend the time for filing for good cause shown, which, in this case, could have been found in the incorrect address and delayed notice. Although the allowance of this claim will further dissipate the funds available to other creditors, the Comptroller's claim was timely filed and thus it is not inequitable to allow it.

The Trustee's motion is accordingly denied, and the Comptroller's claim hereby allowed, and the Attorney General of Texas is directed to prepare an appropriate order.

Signed this 2nd day of February, 1987.

/s/

United States Bankruptcy Judge

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FT. WORTH DIVISION

IN RE

ROBINTECH, INC. **CASE NO. 483-00558-11**

D E B T 0 R

ORDER ALLOWING CLAIM OF COMPTROLLER OF PUBLIC ACCOUNTS

On the 25th day of November, 1986 came on to be heard the Motion for Summary Judgment filed by the Trustee in the above-referenced proceeding and said Trustee's Objection to the claim of the Texas Comptroller of Public Accounts; and the Court, having heard the evidence and arguments of counsel, finds that the time allowed for filing of claims due to the improper mailing of the notice of bar date was constitutionally insufficient to bar the Comptroller's claim. The court further finds that Rule 9006(f) applies in this case to afford the Comptroller an additional three days beyound the bar date to file its proof of claim and that the Comptroller did file his claim within the three additional days. It is therefore

ORDERED, ADJUDGED and DECREED that the Trustee's Motion for Summary Judgment is denied and that the Comptroller's claim is hereby allowed.

Signed this 12th day of February, 1987.

/s/
Harold C. Abramson, United States Bankruptcy Judge

APPENDIX D

Applicable Bankruptcy Rules

Rule 2002(a)(8) [in pertinent part]

(a) *Twenty-Day Notices to Parties in Interest.* Except as provided in subdivisions (h), (i) and (k) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 20 days notice by mail of

...

(8) the time fixed for filing proofs of claims pursuant to Rule 3003(c).

Rule 3003(a) and (c) (3)[in pertinent part]

(a) *Applicability of Rule.* This rule applies in chapter 9 and 11 cases.

...

(c) *Filing Proof of Claim.*

...

(3) *Time for Filing.* The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed.

Rule 9006(e) and (f) [in pertinent part]

(e) *Time of Service.* Service of process and service of any paper other than process or of notice by mail is complete on mailing.

(f) *Additional Time After Service by Mail.* When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail, three days shall be added to the prescribed period.

Supreme Court, U.S.
FILED
JUN 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

In the Matter of ROBINTECH, INC.,

Debtor.

BOB BULLOCK, Comptroller of Public Accounts of the State of Texas,

Petitioner,

vs.

OPPENHEIM, APPEL, DIXON & CO.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

The questions presented are the following:

I.

Did the Court of Appeals for the Fifth Circuit correctly apply the plain language of Bankruptcy Rule 2002(a)(8) by refusing to extend the bankruptcy claim bar date by three days under Bankruptcy Rule 9006(f) when notice of the bar date was sent by mail to creditors twenty days before the bar date as required by Bankruptcy Rule 2002(a)(8)?

II.

Does the question presented by the Petition for a Writ of Certiorari in the instant case rise to the level of importance warranting this Court's exercising its discretion to grant review?

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SUMMARY OF ARGUMENT

The court below correctly decided that the requirements of Bankruptcy Rule 2002(a)(8) were complied with in the instant case when the notice of the bankruptcy claim bar date (the "bar date") was placed in the mail a full twenty days before the bar date. The Fifth Circuit Court of Appeals properly rejected Petitioner's contention that Bankruptcy Rule 9006(f) should be viewed as extending the bar date by three additional days because Rule 9006(f) applies only when a time period runs from the date on which a notice is served, and not, as here, when the notice simply informs a party of the deadline by which that party must perform an act. Furthermore, even if the court below were incorrect in its holding, the issue presented by Petitioner does not merit review by this Court.

ARGUMENT

I.

The Decision of the Court of Appeals Below Was Correct.

A. The court below correctly relied on its interpretation of Federal Rule of Civil Procedure 6(e) in determining the inapplicability of Bankruptcy Rule 9006(f).

Bankruptcy Rule 2002(a)(8) provides that all creditors in a Chapter 11 bankruptcy proceeding shall receive not less than twenty days notice by mail of the time fixed for filing proofs of claims (the "bar date"). In Chapter 11 bankruptcy cases, such as the instant case, the actual bar date is set pursuant to court order under Bankruptcy Rule 3003(c)(3), not by Bankruptcy Rule 2002(a). The Advisory Committee on Bankruptcy Rules' Note to Bankruptcy Rule 2002(a) states that subdivision (a) of the rule is satisfied if the notices are deposited in the mail at least twenty days before the bar date because notice by mail is

complete upon mailing. Bankruptcy Rule 9006(f) provides, by contrast, that when there is a right or requirement to do some act within a prescribed period which begins to run from service of a notice, and the notice is served by mail, three days shall be added to the prescribed period.

As is demonstrated below, since the bar date in the instant case was set by court order and not by service of notice pursuant to Bankruptcy Rule 2002(a), Bankruptcy Rule 9006(f) had no application here.

The Advisory Committee on Bankruptcy Rules' Note to Bankruptcy Rule 9006(f) states that Rule 9006(f) "is the same as" Rule 6(e) of the Federal Rules of Civil Procedure. Advisory Committee Note to Bankruptcy Rule 9006(f). The court below naturally looked, therefore, to Federal Rule of Civil Procedure 6(e) to determine the proper application of Bankruptcy Rule 9006(f). In examining precedents interpreting Federal Rule of Civil Procedure 6(e), the Fifth Circuit correctly referred to its decision in *Carr v. Veterans Administration*, 522 F.2d 1355, 1357-58 (5th Cir. 1975). While the facts and issues in *Carr* were different from the facts and issues in the case at bar, the *Carr* court's interpretation of Rule 6(e) and its purpose is applicable to this case. In *Carr*, the Fifth Circuit observed that the probable purpose of Rule 6(e) is only to guarantee that parties served personally have no advantage over those served by mail when the choice of service by mail or in person is at the option of the party effecting service. Rule 6(e), *Carr* held, had no application when all parties must be served by mail. In the instant case, the Fifth Circuit similarly recognized that Rule 6(e) (and Bankruptcy Rule 9006(f)) would not apply because all parties were served by mail as required by Bankruptcy Rule 2002(a).

Moreover, *Carr* is merely one of a long line of cases from several circuit and lower federal courts which have consistently ruled that Federal Rule of Civil Procedure 6(e) extends a time

period only when a party served with notice by mail has a "prescribed period" to act and the time period begins to run from the date of service of such notice, but that Rule 6(e) will not extend a fixed deadline merely because notice of that deadline is served by mail. *Carr*, 522 F.2d at 1357. Thus, the court in *Carr* declined to invoke Rule 6(e) to extend the six-month period for filing a federal tort claim after a federal agency mailed a final notice of denial to a claimant. *See also, Mosel v. Hills Dep't Store, Inc.*, 789 F.2d 251 (3d Cir. 1986) (rule 6(e) does not extend ninety-day period from date of receipt of EEOC right-to-sue letter in which to file suit); *Clements v. Florida East Coast Ry. Co.*, 473 F.2d 668 (5th Cir. 1973) (rule 6(e) does not provide extension of obligation to pay costs "within 90 days"); *Flint v. Howard*, 464 F.2d 1084 (1st Cir. 1972) (same; ten-day period for filing motions under Federal Rule of Civil Procedure 52 or 59); *Goff v. Pfau*, 418 F.2d 649 (5th Cir. 1969), *cert. denied*, 398 U.S. 931 (1970) (same; time for filing petition for review of referee's order under former Bankruptcy Act); *United States ex rel. Tennessee Valley Auth. v. Easement & Right of Way*, 386 F.2d 769 (6th Cir. 1967), *cert. denied sub nom. Skaggs v. United States*, 390 U.S. 947 (1968) (same; statutory time for filing exceptions to commissioners' award).

The Court of Appeals below was also correct in seeking guidance from Federal Rule of Civil Procedure 6(e) in interpreting Bankruptcy Rule 9006(f). Rule 9006(f), like a number of Bankruptcy Rules, is explicitly modeled on a counterpart Federal Rule of Civil Procedure. It is only logical, therefore, for a court that construes such a Bankruptcy Rule to be guided by constructions of the equivalent Federal Rule of Civil Procedure. The Court of Appeals for the Fifth Circuit has used this method at least twice previously. *See In re Aguilar*, 861 F.2d 873, 874-75 & n.2 (5th Cir. 1988); *In re Seiscom Delta, Inc.*, 857 F.2d 279, 281 (5th Cir. 1988).

Petitioner objects to the Court of Appeals' reliance on precedent interpreting Federal Rule of Civil Procedure 6(e).

Petition, p.5. Petitioner fails, however, to justify this objection in light of the words of the Advisory Committee on Bankruptcy Rules' Note to Bankruptcy Rule 9006(f), which instructs that Rule 9006(f) "is the same as" Rule 6(e) of the Federal Rules of Civil Procedure. Moreover, Petitioner cites no cases that interpret Rule 6(e) in a manner contrary to the precedent relied upon by the Court of Appeals. Respondent has found no such case.

B. Under the plain language of Bankruptcy Rules 9006(f) and 2002(a)(8), the bar date herein should not be extended three days.

Petitioner incorrectly states in his Petition that he "had the *right to file a proof of claim within not less than 20 days after service by mail of the notice* of bar date." Petition, p.6 (emphasis in original). Petitioner also argues that the plain language of the Bankruptcy Rules should control. *Id.* at p.5. Petitioner, however, misinterprets the plain language of Bankruptcy Rule 2002(a)(8), which does not establish the bar date but only provides the mechanism for giving notice to creditors of the deadline for filing a proof of claim. The Rule states that "the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 20 days notice by mail of . . . (8) the time fixed for filing proofs of claims pursuant to Rule 3003(c)." Bankruptcy Rule 2002(a)(8). As stated in the Advisory Committee on Bankruptcy Rules' Note to Rule 2002(a), "Since notice by mail is complete on mailing, the requirement of subdivision (a) is satisfied if the notices are deposited in the mail at least 20 days before the event." Advisory Committee on Bankruptcy Rules' Note to Bankruptcy Rule 2002(a). *See also* Bankruptcy Rule 9006(e)(service by mail is "complete on mailing").

Indeed, Bankruptcy Rule 2002(a) has nothing to do with setting the bar date in a Chapter 11 bankruptcy case. Bar dates in such cases, as in the instant case, are set pursuant to a separate order of the Bankruptcy Court pursuant to Bankruptcy

Rule 3003(c)(3). Bankruptcy Rule 2002(a)(8) requires only that notice of the bar date be placed in the mail twenty days before the bar date, which Petitioner admits was done in this case. It is clear, therefore, that the Bankruptcy Rules do not guarantee creditors a twenty-day period to file a claim, as Petitioner contends, but instead only provide that notice of the bar date will be placed in the mail twenty days before that date.

Petitioner also mistakenly asserts that Bankruptcy Rule 9006(f) extends the bar date by three days because the notice of the bar date is served by mail. That interpretation is incorrect because it purports to invoke the rule in circumstances to which the rule was not intended to apply. Rule 9006(f) provides the following:

> When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail, three days shall be added to the prescribed period.

Rule 9006(f) is inapplicable to the case at bar because Petitioner was required to perform an act to protect his rights (to wit: file a proof of claim) before a definite deadline, as distinguished from being required to perform an act "within a prescribed period" of time after service of the notice. The notice of bar date did not give Petitioner a "prescribed period" after service of a notice within which to do some act; it simply notified Petitioner that any claims filed after February 14, 1984 would be barred. Thus, construing the plain language of Bankruptcy Rules 2002(a)(8) and 9006(f), the Court of Appeals below properly held that the bar date in the instant case should not be extended three days merely because notice of the bar date was served by mail.

Significantly, with the sole exception of the Bankruptcy Court decision in the instant case, 69 Bankr. 663, all Bankruptcy Courts which have interpreted Bankruptcy Rule 9006(f) in the context of proof of claim bar dates have reached the same result

as did the Circuit Court below. *See In re Roberts*, Ch. 7 Case No. 87-00053 (Bankr. D. Vt. March 31, 1989) (LEXIS Bankr. 528) (reproduced in Appendix hereto) (rule 9006(f) does not extend Chapter 7 bar date); *In re Allegheny Int'l, Inc.*, 93 Bankr. 910, 912 (Bankr. W.D. Pa. 1988) (same; Bankruptcy Code chapter unstated); *In re Wellman*, 74 Bankr. 91, 93 (Bankr. D.S.C. 1985) (same; Chapter 11 bar date); *In re Whitten*, 49 Bankr. 220, 222 (Bankr. N.D. Ala. 1985) (same; Chapter 13 bar date). *See also Centrust Sav. Bank v. Duncan (In Re Duncan)*, 86 Bankr. 288 (Bankr. M.D Fla. 1988) (rule 9006(f) does not extend sixty-day period for filing complaint to determine dischargeability); *Highland Community Fed. Credit Union v. Williams (In re Williams)*, 75 Bankr. 887 (Bankr. D. Or. 1987) (same); *C.M. Wilburn v. First Citizens Bank & Trust Co. (In re Wilburn)*, 72 Bankr. 167 (Bankr. D.S.C. 1986) (rule 9006(f) does not extend filing date for complaint objecting to discharge).

Moreover, to accept Petitioner's interpretation would substantively change the meaning of Bankruptcy Rule 2002(a). Rule 2002(a) mandates that twenty days notice of eight enumerated deadlines be provided by mail to parties in interest, with no express provision for personal or other method of serving such notices. Thus, if Petitioner's proposed interpretation of Rule 2002(a) were to be accepted, this Court would be rewriting Rule 2002(a) to require twenty-three days, rather than twenty days, notice in each of the eight enumerated situations.

The above observation merely highlights the inapplicability of the three-day extension under Bankruptcy Rule 9006(f) to notice of a bankruptcy claim bar date. Bankruptcy Rule 3003(c)(3) governs extensions of proof of claim bar dates in Chapter 11 cases, not Rule 9006(f). This Court, by promulgating Bankruptcy Rules 2002(a)(8) and 9006(f) effective August 1, 1983 (*See* 28 U.S.C.A. § 2075 (West 1982):

Supreme Court Order Prescribing Rules, April 25, 1983, *reprinted*, 75 L.Ed.2d xliii (1983) *and* 11 U.S.C.A. Rules 1 to 7000, XIII (West 1984)), has approved twenty days notice of the bar date by mail as the minimum fair notice time period. Petitioner does not allege that twenty days notice by mail was unfair. He is simply asking this Court to amend Bankruptcy Rule 2002(a)(8) in order to allow Petitioner three additional days to which he is not entitled under the rules as they now stand.

II.

The Question Presented by Petitioner Does Not Merit Supreme Court Review.

Even if the Court of Appeals for the Fifth Circuit were incorrect in holding that Bankruptcy Rule 9006(f) does not apply in this case, the issue presented in the Petition for a Writ of Certiorari is not worthy of this Court's review. Rule 17 of the Rules of the Supreme Court of the United States indicates that a writ of certiorari will be granted only when "there are special and important reasons therefor" and lists examples of the character of reasons that will be considered. The question upon which Petitioner seeks review simply does not fall within any of those examples or otherwise merit the attention of this Court.

Petitioner asserts that review of the opinion below is necessary to resolve an important problem as to the interpretation of the Bankruptcy Rules. Yet Petitioner fails to cite any other appellate cases dealing with the issue he presents to the Court, and Respondent has found none. It is respectfully submitted that if the question presented by Petitioner were as important as Petitioner suggests, then other litigants would have raised it on appeal at some time since Bankruptcy Rules 2002(a) and 9006(f) became effective in 1983.

Moreover, the decision of the Fifth Circuit below is not in conflict with any other reported decisions from any court other than that of the Bankruptcy Court in this very case. *See* 69

Bankr. 663 (Bankr. N.D. Tex. 1987). The interrelationship between Bankruptcy Rules 9006(f) and 2002(a)(8) is not "unresolved," as implied by Petitioner. Petition, pp. ii, 5. Numerous Court of Appeals decisions, cited at pages 3 and 4 above, have consistently interpreted Federal Rule of Civil Procedure 6(e). Since, as established above, Bankruptcy Rule 9006(f) is "the same as" Federal Rule of Civil Procedure 6(e), these decisions, by extension, uniformly and correctly construe Bankruptcy Rule 9006(f). Moreover, the Bankruptcy Court decisions, cited at pages 7 and 8 above, have explicitly and consistently ruled contrary to Petitioner's interpretation of Bankruptcy Rule 9006(f).

The decisions of the Bankruptcy Court and District Court below were anomalous departures from the well-settled judicial interpretation of Federal Rule of Civil Procedure 6(e) and its Bankruptcy Rule counterpart. The Court of Appeals below properly performed its appellate function by deciding this case according to the universally accepted construction of Rule 6(e) based upon the plain meaning of that rule.

Any issue that is dispositive of a case, of course, will be "important" to the parties involved. But this does not render every such question "special and important" within the meaning of Supreme Court Rule 17. *See Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). Petitioner seeks to invoke the discretionary review power embodied in a writ of certiorari to obtain his fourth hearing upon a technical issue of bankruptcy procedure that has been of interest to very few litigants (as evidenced by the dearth of reported decisions) and apparently to no appellants other than Petitioner. He seeks this extraordinary remedy not really to seek clarification of any "unresolved" question of law, but merely in an attempt to convince this Court to change a clear, fair, and well-settled Bankruptcy Rule so that Petitioner will have more time to file his proofs of claims in bankruptcy cases. For the reasons stated above, the Court should reject this attempt.

CONCLUSION

The question of whether Bankruptcy Rule 9006(f) should be invoked to extend the bar date in this case by three days was adequately reviewed and correctly decided by the Court of Appeals for the Fifth Circuit. The Fifth Circuit's decision that Bankruptcy Rule 9006(f) does not apply to the instant facts is the correct interpretation of that rule and achieves a fair result to all parties in interest. Moreover, the question presented by Petitioner is not sufficiently significant to warrant review by this Court.

Wherefore, a writ of certiorari should not issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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APPENDIX

In re Roberts, Ch. 7 Case No. 87-00053 (Bankr. D.Vt. March 31, 1989) (LEXIS Bankr. 528) (Text reprinted verbatim from LEXIS printout except lengthy quotations are indented for clarity.).

IN RE: EDWARD ROBERTS,
d/b/a/ ROBERTS CONSTRUCTION, Debtor

Case No. 87-00053 Chapter 7

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF VERMONT

1989 Bankr. LEXIS 528

March 31, 1989, Decided and Filed

[*1]

Francis G. Conrad, U.S. Bankruptcy Judge

COUNSEL:

Raymond J. Obuchowski, Esq., Mayer, Berk & Obuchowski, South Royalton, Vermont, Trustee, pro se.

Fred I. Parker, Esq., Langrock, Sperry, Parker & Wool, Burlington, Vermont, for creditor Gordon N. Owen, d/b/a G.N. Owen & Sons (Owen).

OPINION BY: CONRAD

OPINION:

MEMORANDUM DECISION n1 ON DISALLOWANCE OF CLAIM

n1 We have jurisdiction to hear this matter under 28 USC § 1334(b) and the general reference to this Court. This is a core matter under 28 USC § 157(b)(2)(B). This Opinion constitutes findings of fact and conclusions of law under F.R. Civ.P. 52 as made applicable by Rules of Practice and Procedure in Bankruptcy Rule 7052.

FRANCIS G. CONRAD, UNITED STATES BANKRUPTCY JUDGE

Owen moves the Court, under Rules of Practice and Procedure in Bankruptcy Rule 3008, to reconsider the disallowance of its claim and the allowance of the trustee's final

accounting. Owen argues that because the Bankruptcy Clerk's Office notified it by mail of the ninety (90) day period within which to file a proof of claim under Bankruptcy Rule 3002(c)(5), by virtue of Rule 9006(f), Owen had an additional three (3) days within which to file its claim. The trustee disagrees.

The [*2] facts are straightforward and are not disputed. Debtor filed its voluntary Chapter 7 petition on March 17, 1987. According to the debtor's filed schedules, there was no estate from which any dividend could be paid to creditors. On March 24, 1987, the Court issued a Notice Order setting the first meeting of creditors and indicating that it was unnecessary to file claims at that time. Assets were eventually realized and, on August 4, 1987, the Bankruptcy Clerk mailed a "Notice to Creditors and Other Parties in Interest of the Need to File Claims." The Clerk's notice advised creditors they must file their proofs of claims in this case on or before November 2, 1987.

Owen dated and mailed its proof of claim to the Bankruptcy Clerk on October 30, 1987. The proof of claim was received and file stamped by the Bankruptcy Clerk's Office on November 5, 1987, three days beyond the bar date. Owen received notice of the filing of the trustee's report and final account, and notice of a hearing for approval of same between November 17, 1988 and November 29, 1988. n2 Included in the final account was the trustee's disallowance of Owen's claim against Debtor in the amount of $4,479.26 as not being [*3] timely filed. The trustee's report and final account were heard and approved by the Court on December 19, 1988. Neither Owen, nor counsel for Owen, appeared at the hearing. On December 27, 1989, Owen filed its "Motion to Reconsider Disallowance of Claim and Allowance of Final Account." After a February 6, 1989 hearing on the motion to reconsider, we reserved decision.

n2 See, Owen's "Motion to Reconsider Disallowance of Claim and Allowance of Final Account," pg. 1.

The Rules of Practice and Procedure in Bankruptcy provide us with the initial framework for an analysis of this dispute. Bankruptcy Rule 3002(c) n3 governs the time within which proofs of claims must be filed in Chapter 7, Chapter 12, n4 and Chapter 13 cases. The case law in this Circuit consistently regards the prescribed time period allowed for the filing of proofs of claims set forth in Rule 3002(c) as a statute of limitations barring late filing. n5 In re Nohle, 93 BR 13, 15 (Bkrtcy.N.D.N.Y. 1988) (citing cases). Accord, Associated Container Transportation [Australia] Ltd. (In re Black & Geddes, Inc.), 58 BR 547, 552-553 (S.D.N.Y. 1984). "This . . . filing requirement is a mandatory nondiscretionary [*4] statute of limitations, and may not, therefore, be extended by the courts once it has expired." Lazar v. Sullivan (In re Sullivan), 36 BR 771, 772 (Bkrtcy.E.D.N.Y. 1984). See, In re Alstead Automotive Warehouse, Inc., 16 BR 924 (Bkrtcy.E.D.N.Y. 1982).

n3 Rules of Practice and Procedure in Bankruptcy Rule 3002(c) provides:

(c) Time for Filing. In a chapter 7 liquidation or chapter 13 individual's debt adjustment case, a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, except as follows:

> (1) On motion of the United States, a state, or subdivision thereof before the expiration of such period and for cause shown, the court may extend the time for filing of a claim by the United States, a state, or subdivision thereof.
>
> (2) In the interest of justice and if it will not unduly delay the administration of the case, the court may extend the time for filing a proof of claim by an infant or incompetent person or the representative of either.

(3) An unsecured claim which arises in favor of a person or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that person or denies or avoids the person's interest in property. If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.

(4) A claim arising from the rejection of an executory contract of the debtor may be filed within the time as the court may direct.

(5) If notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall notify the creditors of that fact and that they may file proofs of claim within 90 days after the mailing of the notice.

(6) In a chapter 7 liquidation case, if a surplus remains after all claims allowed have been paid in full, the court may grant an extension of time for the filing of claims against the surplus not filed within the time hereinabove prescribed. [*5]

n4 Chapter 12 cases are governed by Rule 3002(c) as well, although the rule does not so specify. See, In re Wharry, 91 BR 31 (Bkrtcy.N.D.Ohio 1988); In re King, 90 BR 155 (Bkrtcy.E.D.N.C. 1988). See also, VLBR 3002.

n5 We make a clear distinction between the Rule 3002(c) provisions for the time within which one must file a proof of claim in a Chapter 7, 12, or 13 case and Rule 3003(c)(3). Under Rule 3003(c)(3), the Court fixes the time within which proofs of claims may be filed in a Chapter 11 reorganization case. Additionally, Rule 3003(c)(3) provides that "for cause shown," the Court may extend the time within which proofs of

claims may be filed. The District Court for the District of Vermont, in reversing our denial of a Chapter 11 creditor's motion to enlarge time for filing of a proof of claim under Rule 3003(c)(3), commented on the statute of limitations analogy:

> "Although courts have ascribed statute of limitations characteristics to the claims bar, the claims bar departs from a statute of limitations in one essential fashion. Unlike the finality of a statute of limitations, the claims bar is subject to statutory and equitable extension. . . . Rule 3003(c)(3) orders lack the finality contemplated by Bankruptcy Rule 9024 and F.R.Civ.P. 60(b)." In re STN Enterprises, Inc. Slip Op., dated July 28, 1988, Billings, D.J. (now Chief Judge).

The instant issue, however, is a late-filed Chapter 7 proof of claim upon which Rule 3003(c)(3) has no application. Unlike Rule 3003(c)(3), Rule 3002(c) creates a statute of limitations barring statutory or equitable extension. Rule 3002(c) subsections (1) though [sic] (6) provide specific exceptions to the 90 day time frame within which to file proofs of claim, but which are in themselves strictly controlled and limited by Rule 3002. See, Rules of Practice and Procedure in Bankruptcy Rule 9006(b)(3). [*6]

In In re Valley Fair Corp., 4 BR 564 (Bkrtcy.S.D.N.Y. 1980), a Chapter XI Act case involving a dispute whether the period of time Ordered by the Court for the filing of a claim by the creditor constitutes a statute of limitations, Judge Babitt held:

> It is no longer a litigable issue, and needs no citation of abundant authority, that the period fixed by statute for the filing of claims against the assets of an estate is a statute of limitations, mandatory and inexorable, peremptory and unyielding even to the exercise of some equitable power. . . . Internal proof that no deviation was contemplated [by Congress] is found in . . .[former] Rule 906(b) . . . .

Id., at 566-67. (parentheticals supplied for clarity). These Courts have found that the rule is to be strictly construed "because the purpose of a claims bar date is to provide the debtor and its creditors with finality and to insure the swift distribution of the bankruptcy estate." In re Nohle, supra, at 15, citing, In re Johnson, 84 BR 492, 494 (Bkrtcy.N.D.Ohio 1988) and In re Good News Publishers, Inc., 33 BR 125, 126 (M.D.Tenn. 1983). We agree. Furthermore, implicit in Rule 3002(c) is the restriction [*7] that the ninety (90) day time period for filing proofs of claims cannot be enlarged unless one of six exceptions are germane. The terms of Rule 3002(c) permit an enlargement of the time within which to file a proof of claim only in the presence of certain very narrowly constructed situations such as for the filing of a claim by an infant or incompetent person, or in the event there remains a surplus after all other allowed claims have been satisfied.

Rules of Practice and Procedure in Bankruptcy Rule 9006(b) governs the Bankruptcy Court's authority to enlarge time. We are empowered by virtue of Rule 9006(b), upon a showing of excusable neglect, to extend the time constraints for undertaking a required act. The express language of that subsection, however, states that such a showing may not be made to extend the time period prescribed in Rule 3002(c) for the filing of Chapter 7, 12, or 13 claims. See, Rules of Practice and Procedure in Bankruptcy Rule 9006(b)(3). See also, In re Popular Fruit & Produce, Inc., 21 BR 185 (Bkrtcy.S.D.N.Y. 1982).

We note that inherent in the strict time requirements of the Bankruptcy Rules is the assumption that a creditor has received notice. If [*8] notice is given as required by Bankruptcy Rule 2002, save circumstances which fall under the enlargement provisos of Rule 3002(c), the time prescribed for the filing of a Rule 3002 proof of claim is quite simply an absolute bar date.

Notice, or rather, lack thereof, is not an issue here. Owen received notice of a no-assets bankruptcy filing which subsequently realized assets. Owen's proof of claim is one which we

categorize as a Rule 3002(c)(5) proof of claim. Subsection (5) is technically an exception to the claims bar date mandated by 3002(c). The enlargement afforded by Rule 3002(c)(5), however, is, in this Court's eyes, separate and unique from the other five subsections [of Rule 3002(c)]. Whereas the other five subsections may truly modify the 90 day time limit to a time frame unspecified, subsection (5) provides the original 90 day time frame directed by subsection (c). The distinction made in subsection (5) is only an adjustment of when the 90 days begin to run.

Subsection (5) cannot realistically be termed an enlargement provision. The original 90 day time frame is not enlarged because it never originally existed. In a noticed no-assets case, either a creditor's common [*9] sense or the Clerk of the Bankruptcy Court, or both, stall the necessity of filing a claim. Hence, the 90 day period commencing from the date of the § 341(a) meeting, prescribed in Rule 3002(c), never begins to run — at least not in a practical sense. When assets are realized, a new 90 day period is created under subsection (5).

Accordingly, while we recognize an absolute bar date is created under Rule 3002(c), save certain explicit circumstances permitting enlargement under Rule 3002(c)'s subsections, we also hold that a Rule 3002(c)(5) proof of claim, by its nature and because of its nature, does not qualify for departure from the absolute bar date.

The heart and soul of this contested matter rests then in our understanding of Rule 9006(f), and whether we perceive it as applicable to an absolute bar date.

Owen suggests that Bankruptcy Rule 9006(f) n6 affords it an additional three days within which to file its claim. Owen's claim was received and file stamped by the Bankruptcy Clerk three days beyond the bar date, and therefore, according to Owen, by the power of Rule 9006(f)'s three day extension

provision, the claim is not untimely filed. Owen does not provide us with case law [*10] which might support its argument. Owen instead reminds us "the basic premise for allowance of a reconsideration request is that reconsideration should be granted 'according to the equities of the case.'" "Bankruptcy Code § 502(j)." (Owen's "Memorandum in Support of Motion to Reconsider," pg. 1). We, of course, agree and have indeed granted its request for reconsideration. But Owen continues further — buttressing with a plea to our equitable nature which states: ". . . the disallowance Of [sic] the Owen claim could only have resulted from a misreading or misapplication of the law. . . . [T]he disallowance was improper and amounts to a substantial inequity on this Creditor. There is no reason why Owen ought to be treated differently than the other general unsecured creditors whose claims have been allowed." (Owen's "Memorandum in Support of Motion to Reconsider," pp. 1-2).

n6 Rules of Practice and Procedure in Bankruptcy Rule 9006(f) provides:

(f) Additional Time after Service by Mail. When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail, three days shall be added to the prescribed period. [*11]

Pondering for a moment this appeal to our equity, n7 we are disturbed by Owen's inference that, through a judicial interest towards evenhanded treatment to creditors, (and which equitable treatment should encompass, according to Owen, those holding disallowed claims as well), we may betray an absolute bar date which gives us no discretionary power to enlarge the time for filing a Rule 3002(c) proof of claim. In re Nohle, supra; In re Kragness, 82 BR 553, 556 (Bkrtcy.D.Or. 1988). See, In re Owens, 67 BR 418, 423 (Bkrtcy.E.D.Pa

1986); In re Whitten, 49 BR 220, 222-23, 13 BCD 42 (Bkrtcy.N.D.Ala. 1985); In re Ryan, 54 BR 105, 106 (Bkrtcy.E.D.Pa. 1985); In re Markey, 33 BR 332, 333-34 (Bkrtcy.N.D.Ohio 1983).

n7 We make clear that Owen does not formally move to enlarge, or to extend, the bar date, and rightly so — such a motion, here, would clearly fail under Rules 9006(b) and 3002(c). We are not quite sure what it is that Owen asks of us on this point. We believe it has made some leap from reconsideration based on equities to allowance based on equities. Accordingly, for sake of completeness, we discuss briefly the policy this Court employs regarding equitable enlargement. [*12]

As we have already said, Rule 9006(b) explicitly excludes Rule 3002 proofs of claims from enlargement except as expressly provided in Rule 3002 itself. The Nohle Court, quoting In re King, 90 BR 155 (Bkrtcy.E.D.N.C. 1988), said:

> The clear Congressional intent to require filing of valid proofs of claims within the established time limits precludes any exceptions based on general equitable principles. While the effects of the bar date appear harsh, any other result would undermine the clear purpose of the Bankruptcy Rules. In re King, supra, at 158 (citing Maressa v. A.H. Robins Co., Inc., 839 F.2d 220, 221 (4th Cir. 1988)).

In re Nohle, supra, 93 BR at 16 (Bkrtcy.N.D.N.Y. 1988).

Perhaps the most glowing application of such policy is found in the Third Circuit. In In re Pigott, 684 F.2d 239 (3d Cir. 1982), even in the face of very compelling circumstances, the purported justification being the disruption of the claimant's business by the nuclear accident at Three-Mile Island, and that, even if so inclined, "a bankruptcy court has no . . . equitable power to extend the deadline for filing proofs of claim." In re Ryan, supra, 54 BR at 106 (Bkrtcy.E.D.Pa. [*13] 1986), quoting In re Pigott, at 242. In reversing the District Court's

Order affirming the Bankruptcy Court's decision. District Judge Ackerman, sitting by designation, held: "Even where the equities have weighed strongly in favor of extending the time period . . . the bankruptcy court did not have the equitable power to extend the filing date . . . even a few days." In re Pigott, supra, at 243.

In summary, we are bound by the circular control of the Bankruptcy Rules. We are without discretionary power here and accordingly, we cannot lend consideration to the equities of the matter. Owen's allusions on this point must be wholly rejected.

We turn back now to the actual issue. Owen contends that because the August 4, 1987 "Notice to Creditors and Other Parties in Interest of the Need to File Claims" was mailed to Owen, such notice then invites the supervision of Rule 9006(f). This is a very popular argument. Unfortunately for Owen, it rarely prevails. See, In re Alleghany [sic] Intern, Inc., 93 BR 910 (Bkrtcy.W.D.Pa. 1988) (Bankruptcy Rule providing for additional 3 days does not extend bar date for filing of proof of claim); Centrust Savings Bank v. Duncan (In re Duncan), [*14] 86 BR 288 (Bkrtcy.M.D.Fla. 1988) (Rule 9006(f) does not apply to give creditor additional 3 days after expiration of 60 day period to file complaint to determine dischargeability); Highland Community Federal Credit Union v. Williams (In re Williams), 75 BR 887 (Bkrtcy.D.Or. 1987) (same); C. M. Wilburn v. First Citizens Bank & Trust Company (In re Wilburn), 72 BR 167 (Bkrtcy.D.S.C. 1986) (Rule 9006(f) not effective in extending filing date set by Rule 4004(a) governing discharge of Chapter 7 case); In re Wellman, 74 BR 91, 13 BCD 42 (Bkrtcy.D.S.C. 1985) (Rule 9006(f) three day provision can not apply to proof of claim received by clerk of court on 91st day); In re Whitten, 49 BR 220 (Bkrtcy.N.D.Ala. 1985) (Proof of claim due date not extended on account of notice being given by mail).

In In re Robintech, Inc., 69 BR 663 (Bkrtcy.N.D.Tex. 1987), where the trustee objected to a proof of claim filed two days beyond the bar date, the Bankruptcy Court held that the claim would nevertheless be allowed applying the additional three days provided by Rule 9006(f). In so holding the Court specifically rejected any distinction between "a deadline on or before which they were [*15] to file claims" and a "requisite number of days within which to file a claim." Id., at 666. The ruling was appealed to the District Court and upheld. In the Matter of Robintech, Inc., 863 F.2d 393 (5th Cir. 1989), the Circuit Court of Appeals reversed, holding: "the rule (Rule 9006(f) [sic] . . . applies only when the 'prescribed period' is fixed by the date on which the notice is served." Id., at 395. (parentheticals added for clarity) (footnote omitted). The Circuit Court explained that the three day extension provided by Rule 9006(f) functions only to compensate for any possible disparity in the U.S. Postal Service's delivery of the mailed notice and the personal delivery of such notice. The Court stated further that "where, as here, all notices must be by mail, there is no need for such compensation, as all parties are theoretically subject to the same delays." Id.

In a similar ruling directed to a plaintiff-appellant's contention that the 90 day period statutorily mandated for the filing of a suit was extended by F.R.Civ.P. 6(e), n8 the Court of Appeals for the Third Circuit held:

> "[F.R.Civ.P. 6(e)] applies only where a time period is measured from the date of service [*16] by mail, and allows a party so served additional time to respond, in order to account for the time required for delivery of the mail." Mosel v. Hill [sic] Department Store, Inc., 789 F.2d 251, 252 (3d Cir. 1986). (parentheticals added for clarity). The Mosel Court of Appeals held that the three day extension was inapplicable to a statutory requirement to commence a lawsuit within a specified period of time.

n8 The Advisory Committee Note to Rule 9006(f) states that "[s]ubdivision (f) is new and is the same as F.R.Civ.P. 6(e)."

Mosel is analogous to the instant case. Where service of a notice does not trigger the running of a prescribed period of time, but rather, merely establishs [sic] a deadline for the filing of proofs of claims, and accordingly the time period is not measured from the actual date of service by mail. Rule 9006(f) can have no application.

An appropriate Order will be entered.

DATED at Rutland, Vermont this 31st day of March, 1989.